Supreme Court, U. S.
FILED
JUL 28 1980
MICHAEL RODAK, JR., CLERK

No. 79 1128

IN THE
Supreme Court of the United States
OCTOBER TERM, 1979

THE UNITED STATES OF AMERICA and THE CROW TRIBE OF INDIANS, MONTANA,
Respondents

V.

THE STATE OF MONTANA, MONTANA STATE FISH AND GAME COMMISSION, JOSEPH H. KLABUNDE, SPENCER S. HEGSTEAD, EARL L. SHERRON JR., ALFRED L. BISHOP, and PAUL B. TIHISTA; BIG HORN ROD & GUN CLUB; and CITIZENS RIGHTS ORGANIZATION,
Petitioners.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether an Indian tribe which, by virtue of a treaty with the United States, has declared its dependence upon the United States, possesses, as against a subsequently admitted state, sufficient attributes of sovereignty to hold title to the beds of navigable waters which flow through its treaty-created reservation.

2. Whether the mere establishment of an Indian reservation creates a public exigency or international duty which obligates the United States to depart from the general rule requiring the United States to hold in trust title to the beds of navigable waters for subsequently admitted states.

3. Whether an Indian treaty, which guarantees an Indian tribe exclusive use and occupancy of a reservation, but makes no specific reference to beds of navigable waters, to which the fee is retained by the United States, constitutes that definite declaration or evidence of plain intent required to overcome the constitutional presumption that the beds of navigable waters are to be held in trust for subsequently admitted states.

4. Whether, congressional enactment and implementation of legislative means by which an Indian tribe can be divested of all land riparian to a navigable stream implicitly confirms a state's ownership of the bed of such stream.

5. Does not a federal patent to land within an Indian reservation, without reservation or restriction, convey title to such land as measured by applicable state law?

6. May an Indian tribe, in the absence of authorization by either treaty or federal statue, regulate or prohibit hunting and fishing by non-

Indians on lands within a reservation after such lands have been sold to non-Indians pursuant to federal law?

7. Whether a tribal resolution prohibiting hunting and fishing by non-members on their fee patented lands within the reservation, violates the due process or equal protection guarantees of the Fifth Amendment to the United States Constitution when the Tribe does not regulate any of the hunting and fishing activities of its own members.

8. Whether a tribal resolution proscribing hunting and fishing by all non-members within the boundaries of an Indian reservation, including fee patented lands within the reservation, violates 25 U.S.C. §1302(8) of the Indian Civil Rights Act.

9. Whether under Rule 52(a), Federal Rules of Civil Procedure, the lower court was justified in setting aside, *sub silentio,* those trial court findings which are supported by substantial, credible evidence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App., pp. 2-26)[a] is reported at 604 F.2d 1162. The opinion of the district court (Pet.App., pp. 27-55) appears at 457 F.Supp. 599. The court of appeals adopted its opinion in *United States* v. *Finch* on the river ownership issue (Pet.App., pp. 56-82), and it appears at 548 F.2d 822, vacated 433 U.S. 676.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on June 12, 1979. A timely petition for rehearing was denied on September 20, 1979, and a timely application for an extension of time within which to file the Petition for Write of Certiorari was granted, extending time to January 20, 1980. The Petition for Writ of Certiorari was filed on January 21, 1980 (January 20, 1980, was a Sunday.) and was granted on April 14, 1980. A timely application for an extension of time within which to file Petitioners' brief on the merits was granted, extending time to July 22, 1980. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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[a] For clarification, the Petition for Writ of Certiorari will be denominated "Pet."; The Appendix to the Petition, "Pet.App."; the Joint Appendix, "J.App."; and the Appendix to Petitioners' Brief on the Merits as "App." References to the Record on Appeal will be "R., p.____" and to the Transcript, "Tr., p.____. United States exhibits have been denominated "Pl. Ex.____"; Crow Tribe exhibits as "CT Ex.____"; and the State's exhibits as "F&G Ex.____."

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

The following treaties and statues are reproduced as appendices to the petition for certiorari:

(1) Treaty of Fort Laramie, 1851, 11 Stat. 749 (Pet.App., pp. 83-87);

(2) Second Treaty of Fort Laramie, 1868, 15 Stat. 649 (Pet.App., pp. 88-96);

(3) General Allotment Act of February 8, 1887, 24 Stat. 388 (Pet.App., pp. 97-104);

(4) Crow Allotment Act of June 4, 1920, 41 Stat. 751 (Pet.App., pp. 105-118).

Other statues and constitutional provisions involved are:

(1) Act of July 12, 1960, Public Law 86-634, 74 Stat. 869, 18 U.S.C. §1165 (Pet., p. 4);

(2) The Enabling Act of Montana, February 22, 1889, 25 Stat. 676 (Pet., pp. 4-5);

(3) The Fifth Amendment to the United States Constitution (Pet., p. 5);

(4) The Indian Civil Rights Act, Act of April 11, 1968, Public Law 90-284, §202, 82 Stat. 77, 25 U.S.C. §1302 (Pet., p. 5);

(5) Rule 52(a), Federal Rules of Civil Procedure (Pet., pp. 5-6).

In addition to the foregoing, Petitioners wish to set forth the following Montana statutes:

(1) Section 70-1-202, M.C.A., which provides:

"Property of the state — what included.

The state is the owner of:

(1) All land below the water of a navigable lake or stream;***."

(2) Section 70-16-201, M.C.A., which provides:

"Owner of land bounded by water. Except where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream."

STATEMENT OF CASE[1]

The Crow Indian Reservation was created by the Second Treaty of Fort Laramie, May 7, 1868, 15 Stat. 649 (Pet.App., pp. 88-96). Originally consisting of over 8,000,000 acres, by subsequent cessions it has been reduced to its present size of 2,282,764 acres.[2] Of those two million acres, approximately 700,000 or 30 percent are owned by non-members[3] or by the State or Federal Governments. (P1.Ex.1B, Tr. 25)[4]

In 1973, The Crow tribal council, in which non-members are not representated, may not vote, and may not participate (CT Ex. 67, Tr. 27; 291; J.App., p. 9), passed Resolution 74-05 prohibiting non-members from hunting or fishing within the exterior boundaries of the reservation (Pet.App., pp. 119-120). The Area Director of the Bureau of Indian Affairs (hereafter "BIA") advised the Tribe the resolution could not be enforced on fee lands because 18 U.S.C.

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[1]Petitioners, The State of Montana, Montana State Fish and Game Commission, Joseph H. Klabunde, Spencer S. Hegstead, Earl L. Sherron, Jr., Alfred L. Bishop, and Paul B. Tihista, Big Horn Rod & Gun Club, and Citizens Rights Organization, will be referred to as "the State" or "Montana." Respondents, the United States and the Crow Tribe of Indians, will be referred to respectively as "the United States" and "the Tribe" or "the Crow Tribe" or collectively as "the Respondents."

[2]*United States* v. *Montana*, 604 F.2d 1162, 1164, ns. 1 and 3 (9th Cir., 1979); Pet. App., pp. 4-5.

[3]In *United States* v. *Finch*, 395 F.Supp. 205 (D.Mont., 1975), the United States and Finch agreed that approximately 43 percent of reservation residents were non-Indian.

[4]Each party to this litigation presented their respective exhibits to the trial court in a single volume for each party, and they were not separately numbered by record page.

§1165[5] was specifically confined to: "1. Individual Indian trust land, 2. Tribal trust land, and 3. Federal land held for Indian use." (CT Ex. 71rr, J. App. 92) Nevertheless, tribal game wardens commenced to enforce the resolution. (Tr., pp. 252-253)

In 1974 James Junior Finch was arrested for violation of 18 U.S.C. §1165 when he fished in the Big Horn River[6] from riparian land owned by Montana within the Crow Reservation boundaries. The trial court acquitted Finch, based upon his finding that the Big Horn River was owned by the state. (*United States* v. *Finch*, 395 F.Supp. 205, 213 (D.Mont., 1975)) Upon appeal, the lower court reversed, holding that under the principles of *Choctaw Nation* v. *Oklahoma*, 397 U.S. 620 (1970), the Big Horn River was owned by the Crow Tribe and, therefore, judgment should be entered against the defendant. (*United States* v. *Finch*, 548 F.2d 822, 834, Pet.App., pp. 56, 82 (1976)) This Court vacated the lower court's judgment but did not reach the issue of river ownership. (433 U.S. 676 (1977)) Both *Finch* and this case required the lower courts to consider the Crow treaties of 1851 and 1868.[7]

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[5]Act of July 12, 1960, P.L. 86-634, 174 Stat. 869; Pet., p. 4.

[6]The Big Horn River flows through the reservation from south to north and is navigable. J.App., p. 10.

[7]Treaty of Fort Laramie, 1851, 11 Stat. 749, Pet.App., pp. 83-85; Second Treaty of Fort Laramie, 1868, 15 Stat. 649, Pet.App., pp. 88-96. There was a prior treaty with the Crow in 1825 which proclaimed the supremacy of the United States and the Tribe's dependence upon it. August 4, 1825, II J.App., p. 26. The history of these various treaties has been discussed in a series of cases: *Fort Berthold Indians* v. *United States*, 71 Ct.Cl. 308 (1930); *Crow Nation* v. *United States*, 81 Ct.Cl. 238 (1935); *Crow Tribe of Indians* v. *United States*, 284 F.2d 361 (Ct.Cl., 1960); *United States* v. *Finch*, *supra*, 395 F.Supp. at 208-209, 548 F.2d 829-830, Pet.App., pp. 69-74; *United States* v. *Montana*, 457 F.Supp. 599, 601-603 (D. Mont., 1978); Pet.App., pp.2-26).

The First Treaty of Fort Laramie, 1851,[8] (Pet.App., pp. 83-87) made no specific reference to the beds of navigable waters. The United States retained the right to establish roads and posts and agreed to protect the tribes from depredations. (Arts. 2,3) The treaty described territories for each signatory tribe, but a specific reservation was not established.[9] The tribes retained the "privilege of hunting, fishing, or passing over" any of the described territories (Art. 5).

The Second Treaty of Fort Laramie, 1868 (Pet. App., pp. 88-96) also made no specific reference to the beds of navigable waters, although in Article 2, it did refer to the "mid-channel" of the Yellowstone, as did a number of subsequent cessions. See, e.g., *United States* v. *Finch, supra*, 395 U.S. at 215-220. By its terms, the tribes agreed that "bad men among the whites" would be "arrested and punished" according to United States laws. (Art. 1) The Indians retained the "right to hunt on the unoccupied lands of the United States so long as game may be found there-on, and as long as peace subsists among the whites and Indians on the borders of the hunting districts." (Art. 4) The United States retained jurisdiction to evaluate any "depredations on person

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[8]The pre-treaty history of the reservations is described in *United States* v. *Montana, supra*, 457 F.Supp. at 602, and in the App., pp. 10-12. The reservation is located within the Louisiana Territory created in 1803. (8 Stat. 200) Paragraph 3 of that treaty provided:

"The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal Constitution, to the enjoyment of all rights, advantages and immunities of citizens of the United States; and in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess."

[9]*United States* v. *Finch, supra*, 395 F.Supp. at 208.

or property" and bind parties to its decision. (Art. 5) Tribal members could select parcels of land for their individual use, but the United States held complete jurisdiction over "alienation and descent of property between Indians, and on all subjects connected with the government of the Indians on the reservations and the internal police thereof, as may be thought proper." (Art. 6) To fulfill the directions given to W. I. Cullen to negotiate treaties with, *inter alia*, the Crow and to effect "'their location upon suitable reservation with means to enable them to engage in agricultural and other pursuits,'"[10] provisions were contained in the treaty to assist the Indians in the establishment of an agricultural economy. See, e.g., Articles 6, 7, 8, 9, 10, and 12.

Article 2 of the treaty carved out a specific area for "the absolute and undisturbed use and occupation" of the Indians, and the United States solemnly agreed "that no person," except those authorized "shall ever be permitted to pass over, settle upon, or reside in" the reservation. The Indians agreed to make the reservation their "permanent home" (Art. 4). Subsequent cessions of reservation lands were conditioned upon the approval of a majority of the adult male Crow Indians occupying the reservation. (Art. 11)

IMPLEMENTATION OF FEDERAL STATUTES RELATING TO THE RESERVATION.

As a result of a meeting between federal and tribal representatives in May, 1873, Congress passed the Act of April 11, 1882, 22 Stat. 42 (J. App., p. 44) ceding a portion of the reservation to the United

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[10] *The Crow Nation* v. *United States, supra*, 81 Ct.Cl. 238, 250 (1935).

States in return for the agricultural land:

> "remaining in our reservation to be properly surveyed and divided among us in severalty, in the proportions here-inafter mentioned, and to issue patents to us respectively therefor, so soon as the necessary laws are passed by Congress."

See *United States* v. *Powers,* 305 U.S. 527, 529-530 (1939).

On February 8, 1887, the General Allotment Act, 24 Stat, 388 (Pet.App., pp.97-104), was passed. With the Allotment Act, the federal government commenced a general policy of allotting tribal lands within the various reservations to individual Indians. Usually, this provided for a grant of a specified number of acres, to be held in trust for a period of 25 years, after which the allottee was issued a patent in fee. *United States* v. *Powers, supra,* 305 U.S. at 530 (1934); *Draper* v. *United States,* 164 U.S. 241, 245-246.[11]

On February 22, 1889, 25 Stat. 676, Montana was admitted into the Union upon an "equal footing with the original states." Section 4 of that act declared that the State disclaimed "all right and title" to all Indian lands until "the title thereto shall have been extinguished by the United States." (Pet., p. 5)

The provisions of the General Allotment Act of 1887 were more particularly applied to the Crow Reservation by the Crow Allotment Act of June 4, 1920, 41 Stat. 751 (Pet.App., pp. 104-118). By its provisions, all land within the reservation was allotted, except the land located in the Big Horn and

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[11]The view that Indian reservations were temporary and that assimilation into the "dominant society" was the ultimate goal was articulated by Justice McLean in 1832. *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515, 593. See also *Mattz* v. *Arnett,* 412 U.S. 481, 496-497 (1973).

Pryor Mountains.[12] By virtue of the 1920 Allotment Act, non-tribal members could obtain the fee to reservation land from an allottee; from the State of Montana, which was granted sections 16 and 36 (section 16); or by purchasing lots in townsites established by the Secretary of Interior (section 17). Members of the armed forces were given special preferences to reservation lands (section 15). The patent to Montana's riparian land conveyed the land, "together with all the rights, privileges, immunities, and appurtenances of whatsoever nature thereunto belonging * * *." (F&G Ex. 72, Tr. 26; J.App., pp. 71, cf. Tr. 282-283)

Although the act specifically reserved power sites and minerals for the Tribe, there was no such reservation of hunting and fishing rights. (Secs. 6, 10, and 16; J.App., p. 71) The Crow Allotment Act was actively supported by the Tribe.[13]

All of the land riparian to the Big Horn River within the reservation has been allotted pursuant to the 1920 Act, except for one 40-acre tract reserved for purely tribal purposes. (J.App., p. 70) Under the act: "Every single piece of land riparian to the Big Horn River below the take area of the Yellowtail Dam ultimately could end up in non-Indian hands." (J. App., pp. 70)[14]

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[12]The mountain areas are discreet and set apart from the remainder of the reservation (See, e.g., Pl.Ex. 1 (Tr., p. 25).) and consist of approximately 400,000 acres (Testimony of Joe Medicine Crow, IJ.App., p. 70.) "The intent of the mountain reservations in the Crow bill was to reserve the Indian a place for his wild game." Pl.Ex. 18, Tr. 155. IIJ.App. 1.

[13]66th Congress, 2nd Session, April 22, 1920. Congressional Record, 1920, p. 6493-6494. App. pp. 8-9, n. 28.

[14]The location of Yellowtail Dam is indicated on Pl. Ex. 1, Tr. 25.

The tribal interpretation of patenting land was explained:

"A. I guess, although it doesn't spell it out the exact bundle of rights that the man acquires after he purchases the land, it is implied that he can hunt and fish or regulate such activities on his own fee land.

Q. Sure. And that was the concept that the Crow Tribe operated on since 1920, isn't it, Joe, that a man who owned the fee to his land had the right to regulate its use; isn't that right?

A. Yes, I guess it is implied that way. (Testimony of Joe Medicine Crow, Tribal Historian, J.App., pp. 71-72)

In reviewing court and tribal records, the witness could not find "a single instance of where a non-member of the Tribe was prosecuted for hunting and fishing on fee patented land within the reservation." (J.App., pp. 79-80)

FEDERAL, STATE, AND INDIAN ACTIONS AFFECTING HUNTING AND FISHING WITHIN THE RESERVATION.

Prior to 1868, Congress had impliedly sanctioned hunting in the Indian country for "subsistance." (Act of June 30, 1834, 4 Stat. 730, Rev. Stat. §2137.)

Residents of the State of Montana commenced fishing and hunting within the boundaries of the reservation by about the turn of the century (Tr., p.

232) and actively continued to do so until 1973.[15] Between the years 1912 to 1923, the Tribe and reservation superintendent voiced concern over non-Indian hunters on the reservation (Plaintiff's Exhibits 5 through 27, Tr., 155),[16] but there was no serious effort to prevent all hunting and fishing by non-members within the reservation.[17]

As public roads were constructed and fee land became owned by non-Indians, there was at least tacit recognition that the reservation superintendent did not have authority to prevent hunting and fishing on the patented lands or for subsistance. See, e.g., Pl.Exs. 9, 15, 17, 18, and 22, Tr., p. 155. Throughout this period of time, it was further confirmed that bird hunting and fishing were not central to a Crow Indian's diet or sport.[18]

Montana has records of planting reservation waters with exotic species of brown and rainbow trout as early as 1928 (F&G Ex. 100, Tr., pp. 309,

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[15]See Rod and Gun Exhibits 4, 5, 8, 15, 25, 26, 36, 38, 39, 41, 42, 43, 44, 45, 46, 47, 49, 54, 57, 58, 59, 60, and 61, (Tr., p. 27) illustrating that fishing and hunting were being openly pursued within the reservation without protest from either the Tribe or the BIA. See also Testimony of Helman, Tr., pp. 198-204; Lackman, Tr., pp. 213-232; Lewis, Tr., pp. 232-234; and Zimmer, Tr., pp. 241-245.

Rod and Gun Exhibits 21, 22, and 40 illustrate the common concept prevailing at that time: The mountain area — some 400,000 acres set aside for tribal purposes (Section 1, Crow Allotment Act of 1920) — was closed to hunting by Superintendent Robert Yellowtail. Rod and Gun Exhibit 55 reflects that the reservation superintendent felt it was legal to hunt on the reservation. See App., pp. 14-21)

[16]See, e.g., *United States* v. *Montana*, *supra*, 604 F.2d at 1168, Pet.App., p. 14, n. 11a.

[17]Concern was also expressed because of bad hunting practices by Indians. (Pl.Exs. 19, 23, Tr. 27, 155)

[18]Pl.Ex. 20, Tr., pp. 155, 207, 220, IIJ.App., pp. 76, 81; *R. Louie*, The Crow Indians 72 (1938).

356). Local hunting and fishing groups assisted in introducing and planting upland game birds, including ring-necked pheasant, wild turkey and chukkor partridge, with which the reservation is now well stocked.[19] The large elk herd which winters in the reservation moves seasonally into and out of the reservation, as do other big game animals. (Tr. 323-324; 351-352)

In 1960, Congress recognized the problems Indian tribes were having in controlling hunting and fishing on tribal and trust lands and passed legislation which would give Indian tribes the same protection against trespassers as non-Indians possessed. S.Rep.No.1686, 86th Cong., 2nd Ses. 2-3, 1960, F&G Ex. 97, Tr., p. 309; same text quoted in *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 204-206 (1978). See also H. Rep.No. 2593, 85th Cong., 2nd Sess.

The enactment of Public Law 86-634, July 12, 1860, 74 Stat. 869, codified as 18 U.S.C. §1165, made it a crime to go upon:

> "any land that belongs to any Indian or Indian tribe, band, or group and either are held by the United States in trust or subject to a restriction against alienation imposed by the United States, or upon any lands of the United States that are reserved for Indian use, for the purpose of hunting, trapping, or fishing thereon."

It was proposed in the Subcommittee of the House Committee on the Judiciary to amend the original bill so that it extended coverage of the original bill to "Indian country" as defined in 18 U.S.C. §1151.

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[19]Tr., pp. 244, 351; Rod & Gun Exhibits 18, 19, 20, 23, 28, 29, 30, 32, 33, 34, 35, 40, 43, 47, and 54. Tr., p. 27. Landowners have built ponds on deeded land and stocked them with fish provided by the State. Tr., 280-281.

That proposal was rejected to avoid any contention that it applied to non-Indian lands within reservations. (Pet.App., pp. 124-125)

Shortly after §1165 was passed, both federal and state authorities construed its application and uniformly interpreted that provision as not applying to fee or deeded land.[20]

It was not until approximately 1965 that the issuance of a so-called "trespass permit" was inaugurated by the Crow Tribe. (Tr., pp. 234, 242, 245-247.) Subsequently, non-member hunters and fishermen would purchase a permit to go upon the tribal and trust areas without being guilty of trespass under §1165. *Id.*

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[20]See, e.g., Memorandum, August 15, 1960, from Field Solicitor to Area Director, F&G Ex. 9, Tr., 309; letter, March 13, 1961, F&G Ex. 11, Tr., 26; letter from Field Solicitor to Department of Fish and Game, March 28, 1962, F&G Ex. 12, Tr., 309; letter of June 13, 1963, from Department of Fish and Game to Superintendent of Crow Indian Agency, F&G Ex. 15; letter dated December 9, 1964, from Jack Kohler, Warden Captain, to Douglas E. West, F&G Ex. 17, Tr. 26; Fish and Game memorandum dated June 18, 1965, F&G Ex. 19, Tr., 309; Fish and Game memorandum dated August 10, 1965, F&G Ex. 21, Tr. 309; letter from Deparetment of Fish and Game to Florida resident dated September 28, 1966, F&G Ex. 26, Tr., 309; letter from Indian Commissioner to Chairman, Crow Tribal Council, dated November 20, 1973, J.App., pp. 90-92. Contemporaneous interpretation by administrative agencies is "highly relevant" evidence of legislative intent. (*Helvering* v. *Griffiths*, 318 U.S. 371, 395 (1943))

The "notion" that neither the Tribe nor the Federal Government had jurisdiction over hunting and fishing on patented fee lands within the reservation also prevailed after the period of the 1920's but before passage of §1165:

Letter of April 30, 1952, from Reservation Superintendent to Tribal Game Warden, F&G Ex. 5, Tr., p. 26; letter from Chairman, BIA, to Chairman, Crow Tribal Council, 1957,"There is a considerable area of fee-patented land within the reservation owned by non-Indians. We are not aware of any judicial decision that an Indian tribe has the power and authority to prohibit non-Indians owning land within a reservation from hunting or fishing on such land, particularly in the absence of a clearly established exclusive right in the Indians." CT Ex. 71e, Tr., p. 197.

YELLOWTAIL DAM—CATALYST FOR LITIGATION.

The United States commenced an action to condemn a site for Yellowtail Dam in 1957.[21] Subsequently, Congress passed a resolution providing for transfer of the Dam right-of-way to the United States. (July 15, 1958, Public Law 85-523) Yellowtail Dam created a fine trout fishery on the Big Horn River where before none existed (Tr., 347-348) and the creation of this fishery was one of the "public benefits" expected to accrue as a result of the Dam.[22] It was the Dam which provided the catalyst for this litigation, for in 1966, Field Solicitor Bielfeld recommended:

> "A well-supported program to develop the resources of the Big Horn River would do much to bullwark the Crows' claim of title to the bed of the river. A do-nothing attitude would suggest that resources are not important to the needs or advancement of the tribe." (F&G Ex. 23, App., pp. 25-26; see also F&G Ex. 24, Tr., p. 309)

In 1970, the Tribal Chairman wrote to Senator Mansfield, advising him that the Crow Tribe was "now assuming the management of their own reservation fish and wildlife resources" and requesting

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[21] *United States* v. *5.677.94 Acres of Land*, 162 F.Supp. 108 (D.C.Mont., 1958). The tribe consistently argued the Big Horn River was not navigable during the course of that litigation. *Id*, 113-14; *Crow Tribe of Indians* v. *United States*, civ. 214 (D.Mont.), R. 1174, 1207; cf. App. 22-27.

[22] *Crow Tribe of Indians* v. *United States*, Civ. 214, *supra*, R. 1211; F&G Ex. 95; Report by Fish and Wildlife Service, pp. 2, 3, 4, 14, 15, Tr. 26; see also, F&G Exs. 13, 16, 22, 31, 37, Tr. 26. The State conducted extensive fisheries studies on the Yellowtail Reservoir and Big Horn River before (F&G Exs. 86-90, Tr., p. 309) and after completion of the Dam. (F&G Exs. 78-85, Tr., p. 309; see App., pp. 22-26).

assistance from the Bureau of Sports Fisheries and Wildlife. (F&G Ex. 108, Tr., p. 26, App., pp. 25-26) It was also in 1970 that the Bureau first formed an agreement with the Tribe for federal assistance in fish and game managment (CT Ex. 69, Tr., p. 194)[23] but the agreement was not actually implemented until 1976 (Tr., p. 57). Although in approving their agreement with the Bureau, the Tribe recited that it was "interested in promoting * * * reservation hunting and fishing" by non-Indians on the Big Horn River (Ct. Ex. 70-b, Appendix F, Tr., p. 73), such interest was nullified in 1973 with the passage of Resolution 74-05 (Pet.App., pp. 119-120) and the arrest of James Junior Finch. (*Supra*, p. 2)

In conducting its fish and game studies on the Big Horn River, Montana has continuously operated on the assumption that, being navigable, it was owned by the State. Tr. 349-350. See also §70-1-202, M.C.A., *supra*, p. "V"; footnote 22, *supra*.

This action was instituted by the United States to "parallel" *Finch* and the chronology of events and court holdings have been summarized in Montana's Petition, pp. 6-10. Because the lower court reversed the trial court on the ownership and regulatory issues, Montana and the other Petitioners requested this Court for review.

SUMMARY OF ARGUMENT

1. The fundamental constitutional principle which vests in the states title to lands underlying navigable waters within their boundaries is premised

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[23]The Fish and Wildlife Service has never stocked any fish below the afterbay of Yellowtail Dam on the Big Horn River and confined its activities to the Mountain Area and the reservoir (Tr., pp. 79-80).

upon their inherent sovereignty and their constitutional right to be admitted into the Union on an "equal footing." Indian tribes lack those attributes of sovereignty upon which the control of navigable waters is predicated: to protect public commerce and navigation and the public fishery. Although the United States, in isolated instances, has been held to have departed from its constitutionally impossed trust obligation when acting under some "international duty" or "public exigency," it has done so only when a "definite declaration" or "very plain intent" was found to exist. Neither the Treaty creating the Crow reservation nor subsequent events disclose that this double pronged test was satisfied in this case. Certainly, this Court has not carved out any general exception to the "equal footing" doctrine merely because the United States had established an Indian reservation. Since the United States did not convey the fee to the bed of the Big Horn River prior to Montana's statehood, the title thereto was constitutionally vested in the State upon its admission into the Union in 1889.

2. The extent of riparian rights appurtenant to fee patented lands abutting a navigable stream within or adjacent to Indian reservations, is measured by reference to state law. Montana law provides riparian ownership extends to low-water mark on navigable streams. The lower court's failure to follow this basic rule of patent construction should be reversed.

3. By authorizing the sale of reservation lands, without any restrictions, the Federal Government extinguished Indian title to that land. Once former Indian lands are held in fee, all land value constituents are measured by state law. Among those rights which attach to the fee is the right to hunt

and fish. The exclusivity which the United States originally guaranteed the Tribe has been expressly diluted. Since the Tribe does not hold the status of sovereign as to non-tribal members on the reservation, absent a specific delegation of authority in a statue or treaty, they do not possess authority to regulate hunting and fishing activities of non-members on their fee lands.

4. Regulation of hunting and fishing rights, to pass constitutional muster, must be rational. No rational basis exists for the Crow Tribe's facially discriminatory resolution prohibiting the exercise of such rights only by those who have no voice in tribal matters, i.e., non-tribal members. This Court's interest in freeing its citizens from "unwarranted intrusions on their personal liberty" requires that such a summary, arbitrary, and discriminatory regulation be struck down as violative of the Fifth Amendment. The lower court's attempt to interpolate a limitation of application of the tribal resolution to *resident* fee owners only serves to aggravate, rather than ameliorate, objectionable discrimination.

5. The Indian Civil Rights Act prohibits an Indian tribe from denying "any person within its jurisdiction the equal protection of its laws or depriving any person of liberty or property without due process of law." No rational basis exists for the Tribe to discriminate against non-Indians in the patently arbitrary fashion exhibited by Resolution 74-05, and, as a result, it is unenforceable.

6. In the numerous cases in which the courts have reviewed questions of water ownership and tribal jurisdiction, they have carefully scrutinized all relevant facts and construed Indian treaties and laws in light of the "common notions of the day and the assumption of those who drafted them." Where the

factual findings are so integrally related to treaty or statutory construction that a final decision must rest in part on those findings, an appellate court is not free to set them aside unless they are "clearly erroneous." In this case, all major issues were illuminated in light of the "notions of the day," contemporary construction by federal and state agencies, and by knowledge and presumptions under which the Crows themselves operated. While there were some conflicts in the evidence, those conflicts were resolved in favor of Petitioners, and the lower court was not free to set aside the trial court's findings which were based upon relevant and probative evidence.

ARGUMENT

I.

IN ESTABLISHING THE CROW INDIAN RESERVATION, THE UNITED STATES DID NOT WITHHOLD THE BIG HORN RIVER FROM THE FUTURE STATE OF MONTANA

A. *The Dependent Status of the Crow Tribe Is Inconsistent with Ownership of Navigable Waters.*

Ownership of navigable waters by the states finds its source in the English common law (*Martin* v. *Waddell*, 41 U.S. 366, 410-411 (1842); *Pollard's Lessee* v. *Hagan*, 44 U.S. 212, 229 (1884)), as modified by "our own institutions." *Pollard*, *supra*, at 229. Through the American Revolution, the states themselves became sovereigns, and it is because of

this sovereignty that they have the absolute right to all soils underlying navigable waters within their borders. (*Martin* v. *Waddell, supra; Pollard, supra,* at 229; *S. Clair County* v. *Lovington,* 90 U.S., 23 Wall 46, 65 (1874); *Shively* v. *Bowlby,* 152 U.S. 1, 36 (1894)) The soils beneath navigable waters were withheld from grants by both the King of England and the United States to fulfill sovereign trusts to the public: The common and public rights to navigate and engage in commerce upon navigable waters and the common and public right to the fishery. (*Shively* v. *Bowlby, supra,* 152 U.S. at 17.[24]

> "Dominion over navigable waters and property in the soil under them are so identified with the sovereign power of government that a presumption against their separation from sovereignty must be indulged, in construing either grants by the sovereign, of the lands to be held in private ownership or *transfer of sovereignty itself.*" *United States* v. *Oregon,* 295 U.S. 1, 14 (1935); see also *Oregon* v. *Corvallis Sand & Gravel Co.,* 429 U.S. 363, 370, 373 (1977), and *Massachusetts* v. *New York,* 271 U.S. 65, 89 (1926).

The Crow treaties do not reflect the "transfer of sovereignty" upon which ownership of navigable waters is dependent. Cf. *Oliphant* v. *Suquamish Indian Tribe,* 435 U.S. 191, 208, 210, 211 (1978). While Indian tribes who have preserved their tribal relations retain a "semi-independent" position, they do not have the sovereign status of a state or nation. (*Oliphant, supra,* at 211; *United States* v. *Kagama,* 118 U.S. 375, 379 (1885)) Various provisions of the 1868 treaty with the Crow either declare or imply that tribe's "dependence" and its loss of sovereign-

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[24]See also: *Barney* v. *Keokuk,* 94 U.S. 324, 338 (1877); *Hardin* v. *Jordan,* 140 U.S. 371, 381 (1891).

ty—even over its own territory. See, e.g., Arts. 1, 5, 7, 7, 8, 9, and 10, Pet. App., pp. 88, 90-95.

Indian tribes do not hold those sovereign powers, the exercise of which is inconsistent with their dependent status (*Oliphant, supra,* 435 U.S. at 208; *United States* v. *Wheeler,* 435 U.S. 313, 323) or "the overriding interests of the National Government." (*Washington* v. *Confederated Tribes of the Colville Indian Reservation,* ____U.S. ____, 48 L.W. 4668, 4673 (1980) The sovereign powers retained by Indian tribes are those which are necessary to control their "internal and social relations" so far as "not brought under the laws of the Union *or of the State within whose limits they reside.*" (*United States* v. *Kagama, supra,* 118 U.S. at 381-382; emphasis supplied.) These powers have been delimited to include the power to enact and enforce laws applicable to tribal members; to determine tribal membership; regulate domestic relations among tribal members; establish rules for the inheritance of property (*United States* v. *Wheeler, supra,* 435 U.S. at 322, footnote 18); and, most recently, the power to "tax transactions occurring on trust lands and significantly involving a tribe or its members." (*Colville, supra,* 48 L.W. at 4673)

By virtue of their dependent status, the Tribe has lost the power to alienate their land; to enter into direct commercial or governmental relations with foreign nations; and to subject non-members to their criminal laws and try them in tribal courts. (*Wheeler, supra,* at 326)

In *Wheeler,* this court explained that the tribes' loss of sovereign powers followed from their dependent status within federal and state territorial jurisdictions, which is necessarily inconsistent with their ability to independently determine their exter-

nal relations. (*Wheeler, supra,* at 326) Existence of full tribal sovereignty is also inconsistent with congressional policies, which seek accommodation between the interests of the Tribe and of the State (*Colville, supra,* at 4674).

In comparing the remnants of sovereignty which a tribe possesses with the purposes subserved by state ownership of navigable waters, it would be paradoxical for the United States to vest title to a resource which is a vital part of commerce in an entity which has been divested of freedom to independently determine its relationships other than those affecting purely "internal and social relations." (*United States* v. *Kagama,* 118 U.S. 375, 379 (1886); *United States* v. *Wheeler, supra,* 435 U.S. at 422-426.

B. *No International Duty or Public Exigency Existed for the United States to Depart from the General Rule Vesting Montana with Title to Navigable Waters.*

Before the United States may depart from its trust obligation imposed by the Constitution to hold title to soils underlying navigable waters for the future states, there must exist some "international duty or public exigency." (*United States* v. *Holt State Bank,* 270 U.S. 49, 55 (1926); *Shively* v. *Bowlby,* 152 U.S. 1, 49-50 (1894); *Packer* v. *Bird,* 137 U.S. 661, 672 (1891).) Such a "public exigency" or "international duty" was recognized to exist under the exceptional circumstances studied in *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970).

In *Choctaw,* the United States, by treaties, had conveyed fee simple title to a large tract of land to the Choctaw and Cherokee Indians. By those treaties, the United States guaranteed that no portion of the territory would be included within any

state or territory and provided the tribes with strong assurances of self-government and law making powers.[25] As this court observed, the Choctaw reservation was "for most purposes * * * to be considered as an independent country." (*Atlantic & Pac. Rr. Co.* v. *Mingus,* 165 U.S. 413, 435-436 (1897).) The lower court here did not articulate the international duty or public exigency which brought this case within the *Choctaw* exception but, rather, relied upon those treaty provisions which guaranteed the Crow "absolute and undisturbed use and occupation" and that "no person except those herein designated and authorized to do so * * * shall ever be permitted to pass over, settle upon, or reside in" the reservation.

While these provisions declare the Crow will enjoy exclusivity, it does not necessarily follow that the bed and banks of the Big Horn River were being conveyed to them. Ownership and exclusivity are not necessarily synonymous. Ownership of the river does not guarantee exclusivity, because regardless of ownership, the river is still subject to the servitude of public navigation. See, e.g., *Illinois* v. *Ill. Cent. R. Co.,* 146 U.S. 387, 435, 455, 458 (1892); 33 U.S.C., §10.[26] Every other duty which the United States, as trustee, owed the Tribe and every other right which the Crows had in the river were and are preserved without the necessity of conveying river ownership.

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[25]Treaty of Dancing Rabbit Creek, September 27, 1820, 7 Stat. 333, F&G Ex. 67; Treaty of New Echota, December 29, 1835, 7 Stat. 478, F&G Ex. 68, Tr., p. 26.

[26]Act of March 3, 1811, 2 Stat. 606; cf. Act of May 18, 1796, 1 Stat. 468, 43 U.S.C., §931. The United States has admitted that the Big Horn River is burdened with navigational servitude and that abutting landowners possess riparian rights.(J.App., pp. 4-6, answers 28, 37 40, 41, 42.

The Tribe possessed and possesses to this date the right to navigate the river,[27] fish in its waters,[28] dock out to navigable water,[29] use water for irrigation purposes,[30] own land to low-water mark,[31] and finally, by Section 10 of the Allotment Act of 1920, own all sites valuable for power.[32] None of these rights are dependent upon river ownership.

By 1868, case and statute law had insulated the Indians from unauthorized state incursions.[33] Subsequent cases have further protected the Indians' right to self-government.[34] Therefore, there was no duty or exigency existing in 1868 which would support departure from the constitutional obligation requiring the United States to hold the Big Horn River in trust for the future State of Montana.

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[27] *Illincis* v. *Ill. Cent. R. Co., supra,* 33 U.S.C., §10.

[28] *United States* v. *Winans,* 198 U.S. 371 (1905).

[29] *United States* v. *Holt State Bank,* 270 U.S. 49, 59 (1926); *Namen* v. *Confederated Salish & Kootenai Tribe* v. *Namen,* 380 F.Supp. 452, 466 (D.Mont., 1974) 534 F.2d 1376 (9th Cir.) cert.den. 429 U.S. 929 (1976); see also Answers to Interrogatories of United States, J.App., pp. 4-6.

[30] *Winters* v. *United States,* 207 U.S. 564 (1907); *United States* v. *Powers,* 305 U.S. 527, 532 (1934).

[31] See pp. 27-29, *infra.*

[32] Pet.App., p. 112; *supra,* p. 6.

[33] *Worcester* v. *Georgia,* 31 U.S. (6 Pet.) 515 (1832). Cf. Organic Act for Territory of Montana, Sec. 1, May 26, 1864, 13 Stat. 85 (J.App., pp. 29-43); Trade and Intercourse Act of June 30, 1834, 4 Stat. 729.

[34] See, e.g., *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978); *United States* v. *Wheeler,* 435 U.S. 313 (1978); *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976); *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973); *Williams* v. *Lee,* 358 U.S. 216 (1959).

C. *The treaty of 1868 Does Not Address Ownership of Soils Underlying Navigable Waters. Since the United States Retained the Fee to Those Soils, the Treaty, Together with Subsequent Events, Confirms the Constitutional Presumption that They Were Retained for the State.*

The Treaty of 1868 was one of many contemporary treaties which reserved to Indian tribes vast acres of land within which ran miles of navigable waters. Nearly each of those treaties contained language identical or nearly identical to that contained in Article 2 of the Crow Treaty.[35] At the time the treaty of 1868 was negotiated, the Crow were a nomadic tribe following the buffalo culture. (J.App. "I", p. 74) Fish were not a mainstay of their diet, and their disinterest in fish continues to this day. (*Supra*, p. 8)[36] Nor were the Crow dependent upon the Big

[35]Treaty with Cheyenne and Arapahoe, October 28, 1867, 15 Stat. 598, Art. 2, Art. 12 (no cession); Treaty with the Northern Cheyenne & Northern Arapahoe, May 10, 1868, 15 Stat. 655, Arts. 2, 8 (no cession); Treaty with Shoshoni and Bannock, July 3, 1868, 15 Stat. 673, Arts. 2, 11 (no cession); Treaty with Sioux, et al., April 29, 1869, Arts. 2, 12 (no cession); Treaty with the Ute, March 2, 1868, 15 Stat. 619, Arts. 2, 16; Treaty with Kiowa and Comanche, October 21, 1867, 15 Stat. 581, Art. 2; Treaty with the Cheyenne, et al., October 14, 1865, 14 Stat. 703, Art. 2; Treay with Navajo, June 1, 1868, 15 Stat. 667, Arts. 2, 11 (similar language in Treaty with the Klamath, et al, October 14, 1864, 16 Stat. 707, Art. 1; Treaty with the Nez Perces, June 9, 1863. The court also relied on Article 11 of the treaty, requiring tribal consent to future cessions as a recognition of their "extensive ownership rights." however, a similar consent requirment was contained in the Act of January 14, 1889, 25 Stat. 642, studied by the court in *United States* v. *Holt State Bank, supra*, 270 U.S. 49 (1926). This provision should be constrasted with the *Choctaw* treaty which contemplated no future cessions. The provision for future cessions brings the case closer to *Holt* for that reason.

[36]Indian dependence upon fish has been a significant factor in other decisions involving Indian ownership or use of navigable waters. See, e.g. *Skokomish Indian Tribe* v. *France*, 320 F.2d 205, 212 (9th Cir., 1963); *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918).

Horn for travel. (*United States* v. *State of Montana*, 457 F.Supp. at 602 (Pet.App., p. 32) Congress had acted to guarantee that all navigable waters within the Louisiana Territory would remain public highways. (Act of March 3, 1811, 2 Stat. 606, 33 U.S.C. §10)[37] The foundation for the "equal footing" doctrine had been laid down in *Martin* v. *Waddell*, 41 U.S. 366 (1842), and Congress was cognizant of its holding. (Cf. *Rosebud* v. *Kneip, supra*, 430 U.S. 584, 588 (1977)) To effectuate a grant of the soils under navigable waters "would require very plain language." *Martin* v. *Waddell, supra*, at 414.

In two cases, this Court has studied Indian treaty language to perceive whether there existed that "very plain language" authorizing a departure from the general rule. The first of these cases involved treaties with the Chippewa. (*United States* v. *Holt State Bank, supra*, 270 U.S. 49 (1926)) In 1854, the United States agreed to "set apart and withhold from sale, for the use of the" Indians, a vast area of land. (Art. 2, 10 Stat. 1109) In 1855, they agreed to reserve and set apart "a sufficient quantity of land for the permanent homes" of the Indians. (Art. 2, 10 Stat. 1165) See *Minnesota* v. *Hitchcock*, 185 U.S. 373, 389 (1902)[38] Under each treaty, the President had the right to assign portions of the reservation to individual Indians. (Cf. Art. 6 of the 1868 treaty; Pet. App., pp. 91-92) Indian title to the land was "sacred" and entitled the tribe to compensation for its disposal. (*Minnesota* v. *Hitchcock, supra*)

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[37]The Louisiana Territory was specifically held in trust for future states along with all navigable waters. (*United States* v. *Brewer-Elliot Oil & Gas Co.* (249 F. 609, 612, aff'd 270 F. 100, aff'd 260 U.S.77 (1922).)

[38]The *Holt* reservation was "a reservation within the accepted meaning of the term." *Id* at 389.

However, there was no "attempted exclusion of others from the use of navigable waters" (just as there was no such exclusion under the 1868 treaty with the Crow,[39]) and the court concluded that there "was nothing * * * which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy * * * of treating such lands as held for the benefit of the future states." (*Holt, supra,* at 58-59)

The other case in which this Court addressed the question of tribal ownership of navigable waters is *Choctaw Nation* v. *Oklahoma,* 397 U.S. 620 (1970), a 4 to 3 decision, J. Douglas concurring and J. White dissenting. The distinguishing aspects of the treaties and the circumstances giving rise to that decision have been reviewed *supra,* pp. 18-19. Unlike the Choctaw and Cherokee Nations, the Crow Nation was not granted the fee to their reservation, and the treaty contained no stipulation that it would not be contained within any future state. (*Draper* v. *United States,* 164 U.S. 240, 243 (1896)) As in *Holt,* there was no specific reference to navigable waters or the soils under them. The fact that Article 2 of the 1868 treaty and subsequent calls go to the "mid channel" of the yellowstone and the Big Horn Rivers does not alter that conclusion. *In Holt, hundreds of square miles of navigable waters were wholly contained within the reservation! (Holt, supra,* at 58)

In *Martin* v. *Waddell, supra,* the letters patent

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[39]*The Crow Tribe of Indians* v. *United States,* (Civ. 214, D.C. Mont., 1963), R. 1174, 1208: "It is agreed that in 1825, * * * fur trappers used the river to transport their furs to St. Louis * * *. The parties do agree that in 1868, three men went down the river through the canyon. The parties agree that steam-boats penetrated as far up the Big Horn River as the site of the present town of Hardin, on the downstream or north end of the Big Horn Canyon."

specifically included, *inter alia*, "rivers, harbors * * * waters, lakes" but, like many similar charters and patents, were not construed to sever navigable waters "from the powers of government."
(41 U.S. at 414)

The "common notions of the day" were that the river was still open to commerce and to the public fishery right.[40] However, the most significant fact which distinguishes this case from *Choctaw* is that the United States has *never parted* with the fee to the Big Horn River. In *Choctaw*, it was recognized "that if title remained in the United States, it passed to Oklahoma upon admission to the Union as an incident of statehood." *Choctaw, supra*, 397 U.S. at 628. The "equal footing" doctrine so recently reconfirmed by this Court in *Oregon* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 373-374 (1977) forcefully declares the trust under which the United States held title to the Big Horn River. "(A) title which neither a provision in the Act admitting (Montana) to the Union nor a grant from Congress to a third party was capable of defeating." There exist no valid reasons to repudiate that doctrine in this case.

D. *Congressional Action Since 1868 Confirms Montana's Ownership of the Big Horn River.*

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[40]When Yellowtail Dam was authorized, it was assumed the river would sustain a public fishery. For years, employees of Montana's Fish and Game Department studied and planted the river without hindrance from federal authorities or objection from the Tribe. Non-member fishermen had hunted and fished the Big Horn from the turn of the century without interference until Resolution 74-05 was adopted. Montana operated on the assumption it owned the river because it was navigable — strong evidence indeed that ownership had passed to the state! *Infra*, pp. 7-10. Cf. *Martin* v. *Waddell, supra*, 41 U.S. at 414-415; *Puyallup Tribe, Inc.* v. *Washington State Game Dept.*, 433 U.s. 165, 174-175 (1977); *Oliphant, supra*, 435 U.S. at 206.

In providing for the allotment of lands within the Crow Reservation, Congress withheld 400,000 acres located in the Big Horn and Pryor Mountains (*supra*, p. 6, n. 12; Pet. App., p. 105) for the Tribe's "wild game" (pl. Ex. 18, Tr., p. 155) and cattle herd (App., p. 9, n. 28), the "balance is all to be allotted." (*Id.*) Almost all of the land riparian to the Big Horn River has been allotted, and much of it is owned in fee. (*Supra*, p. 6; F&G Ex. 50, Tr., p. 26) Theorectically, all riparian land could be owned by non-members. (J.App., p. 70)

A similar factual situation was studied by this Court in *Puyallup Tribe, Inc.* v. *Washington State Game Dept.*, 433 U.S. 165 (1977) ("*Puyallup III*"). In *Puyallup III*, this Court construed the treaty with the Nisquallys (December 16, 1854, 10 Stat. 1133) against the backdrop of subsequent legislation and events. Article II of the treaty establishes a reservation for the tribe's "exclusive use" and provided that no "white man (was to) be permitted to reside upon the same without permission of the tribe and the superintendent or agent." (433 U.S. at 174) By subsequent legislation, similar to the Crow Allotment Act of 1920, all lands were allotted, and the allottees were permitted to alienate their lands. (433 U.S. at 174) At the time *Puyallup III* was decided, the Indians has alienated all but 22 acres of their reservation, none of which was riparian to the Puyallup River, a navigable stream which bisected their reservation. The tribe argued that the treaty reserved a right to "fish free of state interference." However, this Court held that such:

> "an interpretation clashes with the subsequent history of the reservation and the facts of this case. Pursuant to two acts of Congress, 27 Stat. 633, and c1816, 33 Stat. 565, the Puyallups alienated in

fee simple absolute, all but 22 acres of their 18,000-acre reservation. None of the 22 acres abuts on the Puyallup River.[12] Neither the Tribe nor its members continue to hold Puyallup River fishing grounds for their 'exclusive use.'" (433 U.S. at 173, 174)

In footnote 12, the Court disparaged the tribe's argument that is owned the bed of the river:

"Counsel for petitioner (the tribe) intimated at oral argument that petitioner might contend in the future that it retained trust status title to the bed of the Puyallup River, Tr. of Oral Arg. 10. This contention is at odds with the otherwise uncontradicted findings below." (i.e. that all but 22 acres had been alienated.)

The very fact that Congress passed legislation which contemplated that Crow lands would be alienated and sold to non-members with whom the Crow Tribe was intended to assimilate speaks strongly against any notion that in 1868, trust status title to the bed of the river had passed to the Tribe. To confirm title to a navigable river in an entity which has been implicitly divested of most of the hallmarks of sovereignty and which has alienated communal title to riparian lands is a legal anachronism.

Until the Crow Tribe passed and then attempted to enforce Resolution 74-05 on the Big Horn River, "Neither the Tribe nor its members continue(d) to hold * * * river fishing grounds for 'their exclusive use.' On the contrary, it is undisputed that non-Indian licensees of Respondent fish within the reservation, and under the close supervision" of State wardens. (*Puyallup, III, supra*, 433 U.S. at 174) The Allotment Act of 1920 augmented by subsequent state regulatory action even more strongly confirms

the "notion" that the Big Horn River did not pass to the Crow in 1868. Compare *Martin* v. *Waddell, supra,* 41 U.S. at 414-415, 418.

E. *Conclusion to Part I.*

If indeed the issue of ownership is a "close" one, it is antithetic to that which is required to be "very plain" or "definitely declared" in order to rebut the presumption "confirming the absolute title of the states to the beds of navigable waters"[41] to then hold that title was conveyed to the Crows. In the absence of any international duty or public exigency, the issue should have been resolved in favor of the state.

II.

THE EXTENT OF RIPARIAN LAND OWNERSHIP GRANTED BY FEDERAL PATENT, WITHOUT RESERVATION OR RESTRICTION, IS MEASURED BY REFERENCE TO THE STATE RULE

Once the Federal Government has conveyed land by fee patent, without reservation or restriction, the incidents of ownership of the land will be measured by reference to state law. (*Oneida Indian Nation* v. *County of Oneida,* 414 U.S. 661, 677 (1974); *Joy* v. *City of St.* Louis 201 U.S. 332, 342-343 (1906); *Packer* v. *Bird,* 137 U.S. 661, 669 (1891))[42] That same

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[41] *Oregon* v. *Corvallis Sand & Gravel Co., supra,* 429 U.S. 363, 373-374 (1977); see Pet., pp. 15-16.

[42] Cf. *Dillon* v. *Antler Land Co. of Wyola,* 507 F.2d 940, 942-043 (9th Cir., 1974), cert.den. 421 U.S. 992; and §6 of the 1887 Allotment Act, Pet.App. p. 102, 25 U.S.C. §*349,* involving a land dispute on the Crow Indian Reservation.

rule applies when the United States disposes of Indian lands riparian to navigable or non-navigable streams. (*Wilson* v. *Omaha Indian Tribe,* ____U.S.____, 61 L.Ed.2d 153, 168-169; *Oklahoma* v. *Texas,* 258 U.S. 574 (1922); *Brewer-Elliott Oil & Gas Co.* v. *United States,* 260 U.S. 77, 88-89 (1922); *United States* v. *Oklahoma Gas & Electric Co.,* 318 U.S. 206, 209-210 (1942); cf. *Whitaker* v. *McBride,* 197 U.S. 510 (1904))

> "Grants by the United States of its public lands bounded on streams or waters, navigable or non-navigable, made without reservation or restriction are to be construed as to their effect according to the law of the state in which the land lies. * * * Where it is disposing of tribal lands of Indians under guardianship, the same rule applies." (*United States* v. *Champlin Refining Co.,* 156 F.2d 769, 773 (10th Cir., 1946), aff'd 331 U.S. 788, 789 (1947))[43]

Montana, by both statute and interpretive case law, holds that ownership of land riparian to navigable water extends to low-water mark. (Pet., p. 19, §70-16-201, MCA, p. V, *supra*) The patent, under which Montana holds title, contains no reservations or restrictions which would take the grant outside the general rule. (*Supra,* p. 6.)

Both the United States and the Tribe contend, however, and the lower court so held, that the general rule does not apply to riparian land within the Crow Indian Reservation, because to apply state law may frustrate "federal policy and functions," (*United States* v. *State of Montana, supra,* 604 F.2d

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[43]See also *Shiveley* v. *Bowlby,* 152 U.S. 1, 45 (1894); *Hardin* v. *Jordan,* 140 U.S. 371 (1891); *Choctaw & Chickasaw Nations* v. *Bd. of County Comm'ns,* 361 F.2d 932, 933 (10th Cir., 1966); and cases cited at p.18 of Pet., n. 32.

at 1173; Pet. App., p. 25), despite recognition of the fact that nearly 100 percent of all riparian land along the Big Horn River is either allotted or owned in fee. *Supra*, p. 6.

In *Wilson*, this Court held that when the United States "parted" with Indian land, the "incidents of the resulting ownership" would be determined by state law. (61 L.Ed.2d at 169, no. 18, and pp. 170-171):

> "Indeed * * * several hundred acres of land within the Barrett survey are held in fee, and concededly are not Indian property. These tracts would not be governed by federal rule."

Even if federal common law is the starting point, the federal rule *chooses* the state law to measure the extent of riparian ownership. (*Wilson*, 61 L.Ed.2d at 170-172) Respondents have not supplied "concrete evidence" that adoption of a state rule would adversely affect federal interests. *Wilson*, 61 L.Ed.2d at 172. As this Court observed in *Wilson:*

> "It is true that states may differ among themselves with respect to the rules that will identify and distinguish between avulsions and accretions, but as long as the applicable standard is applied even-handedly to particular disputes, we discern no imperative need to develop a general body of federal common law to decide cases such as this, where an interstate boundary is not in dispute." (*Id.*, at 170)

All landowners riparian to the Big Horn River will be given even treatment under Montana law, and there is no contrary, overriding federal interest discernable.

III.

WHEN THE FEDERAL GOVERNMENT CONVEYED RESERVATION LANDS TO NON-INDIANS, TREATY EXCLUSIVITY WAS DILUTED. AS A RESULT, ABSENT SPECIFIC CONGRESSIONAL AUTHORIZATION, THE CROW TRIBE DOES NOT POSSESS AUTHORITY TO REGULATE NON-MEMBER HUNTING AND FISHING ON FEE LANDS

At the outset, it is mandatory to delimit the issue raised here: Montana is not seeking to regulate or diminish Crow hunting and fishing rights within the reservation; also, this is not a case in which the Tribe's own hunting and fishing rights have been materially diminished.[44] Rather, this case involves only the question of whether an Indian tribe, which has been willingly divested of Indian title to reservation land, has the authority to regulate non-member hunting and fishing on that land.[45]

The lower court held the Tribe possessed such authority and relied upon two sources: The Treaty of 1868 "augmented" by 18 U.S.C. §1165; and "inherent" Indian sovereignty. An analysis of these sources fails to support the lower court's reliance upon them.

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[44]Tr., pp. 8-9 (State's Opening Statement); Cases such as *United States* v. *Winnans*, 198 U.S. 371 (1905), *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968); *Antoine* v. *Washington*, 420 U.S. 194 (1975); and *Washington* v. *Fishing Vessel Ass'n*, ____U.S.____ (1979), upon which Respondents rely, involve protecting or quantifying rights which *survive* treaties, rather than the exclusion of non-members from those rights.

[45]*Puyallup, III, supra*, 433 U.S. 165, is closer to the fact situation involved here. There, also, exclusivity was diluted by subsequent legislative action. (*Supra*, pp. 25-26)

By virtue of the 1868 treaty, the Crow Tribe became entitled to the exclusive use of their reservation. However, that treaty did not restrict the power of the United States to include it within a subsequently admitted state. *Draper* v. *United States, supra,* 164 U.S. at 243. Under Montana's enabling act, jurisdiction over Indian lands was withheld only until title was "extinguished." (Act of February 22, 1889, 25 Stat. 676, Pet., p. 5) The enabling act "necessarily repealed" any treaty provision clearly inconsistent with it. *Draper, supra,* at 243; see also *The Cherokee Tobacco,* 78 U.S., 11 Wall. 616, 620-621 (1871); *Ward* v. *Racehorse,* 163 U.S. 504, 511 (1895).

By virtue of various allotment acts passed in 1882, 1887, and 1920 (*supra,* pp. 4-6), the guarantees of exclusivity, upon which the lower court relied to support the reach of Resolution 74-05 over non-members, was diluted. The allotment philosophy was aimed at the "gradual extinction of Indian reservations and Indian titles." (*Draper, supra,* 164 U.S. at 243)[46] With the allotment acts, former Indian lands[47] became owned by non-Indians. Indian title was extinguished. Concomittant with ownership was the settled rule of patent construction requiring all

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[46]Even the treaty of 1868 contemplated ownership of reservation lands by individual Indians. (*United States* v. *Powers,* 395 U.S. 527, 533 (1939))

[47]Prior to 1948, 62 Stat. 757, 18 U.S.C. §1151, "Indian country," a grant of land in fee extinguished Indian title within an Indian reservation. (*Clairmont* v. *United States,* 225 U.S. 551, 558 (1912); *Ex Parte Crow Dog,* 109 U.S. 556, 561 (1883); *Bates* v. *Clark,* 95 U.S. 556, 561 (1883); *Bates* v. *Clark,* 95 U.S. 204, 206, 207, 209 (1877); and compare *United States* v. *Soldana,* 246 U.S. 530, 533 (1918); *Dick* v. *United States,* 208 U.S. 340, 358-359 (1907); *Browning* v. *United States,* 6 F.2d 801, 802-807 (C.C.A. 8th, 1925? cert.den. 269 U.S. 568; *Trans-Canada Enterprises Ltd.* v. *Muckleshoot Indians,* No. CF-77-992-M (W.D. Wash., 1978) 5 *Indian Law Rpts.,* F-153.

rights or values in that land to be measured by state law. (*Supra*, pp. 27-28) Montana law confers upon landowners exclusive hunting and fishing rights. (*Herrin* v. *Sutherland*, 74 Mont. 587, 601, 241 P. 328 (1925); IJ.App., pp. 71-72; see also F&G Ex. 103, Tr., p. 309) The fact that at the time of the treaty this right was tribal or communal does not undermine this conclusion. Cf. *United States* v. *Powers*, *supra*, 305 U.S. at 532; *Puyallup III*, *supra*, 433 U.S. at 173-174) *Confederated Salish & Kootenai Tribes* v. *Namen*, CV-2343 (D. Mont., September 19, 1979), *Indian Law Rptr*, F-161, 169-175, final opinion filed April 8, 1980, Judge William J. Jameson presiding.)

Although it was true that the Treaty of 1868 did not deprive the Indians of "potential control over [any] source of food on their reservation" (604 F.2d at 1167, Pet.App. 12), superimposed upon the treaty and abrogating the Tribe's exclusivity were subsequent congressional acts which not only permitted but invited non-Indians onto the reservation to share in the resources found there. (IJ.App., pp.71-72) The 1868 treaty is, therefore, clearly not the touchstone upon which Resolution 74-05 was dependent. The original exclusivity has been legislatively diluted. Non-members have been invited onto the reservation and share all those reservation land and water values not specifically reserved. See IJ.App. 71-72.

Nor does 18 U.S.C. §1165 "augment" the lost exclusivity as reasoned by the lower court. 604 F.2d at 1167; Pet.App., p. 12.[48] Congress specifically rejected a proposal to expand the scope of 18 U.S.C. §1165 to "Indian country" so as to avoid "any argument that it would apply to non-Indian land." (Pet. App., p. 125) Legislative history rebuts any notion of

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[48]The Crow Tribe tacitly agrees that 18 U.S.C. §1165 does not apply to fee lands. Crow Tribe Brief in Opposition, p. 12, n. 19.

statutory augmentation. (Pet. 21-22).

The lower court's conclusion that an Indian tribe has inherent sovereignty to regulate a non-member's fee lands within the reservation absent express congressional authorization fails to take cognizance of the dependent status of the tribe and recognition that it cannot independently determine its external relations. There has occured an "implicit divestiture of sovereignty * * * involving the relations between an indian Tribe and non-members * * *." (*United States* v. *Wheeler, supra*, 435 U.S. at 326)

In the legislative history and case law relating to the allotment policy, Congress and the courts contemplated that Indians would "adopt white ways." (*Mattz* v. *Arnett*, 412 U.S. 481, 496-597; *United States* v. *Southern Pacific Transportation Co.*, 543 F.2d 676, 694 (9th Cir., 1976); 66th Congress, 2nd Session, April 22, Congressional Record, 1920, pp. 6493-6494) The goal was always to "civilize" the Indian and eventually assimilate him into the dominant society. This goal is incongruous with retention of political control over land to which Indian title has been "extinguished." (*Supra*, pp. 15, 18, 31, n. 47)

Even if the test of sovereignty laid down in *Colville, supra*, 43 L.W. at 4673, were applied to a non-tax case, the tribal resolution involved here would fail to qualify[49]: First, the transaction which the Tribe is attempting to regulate, i.e., the act of hunting or fishing, takes place on non-trust lands — fee lands. Additionally, the regulation encompasses activities which were not traditionally within the Crow culture, i.e., fishing and bird hunting. Secon-

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[49]The tribal tax power was limited to "transactions occurring on trust lands and significantly involving a tribe or its members."

dly, no tribal interest is significantly involved: Tribal members rarely fish or hunt water fowl; Montana stocks fish, and non-members introduced and stocked birds; big game is primarily located in the "mountain area" and is, therefore, clearly within the reach of §1165; and finally, the migratory nature of the wild fish and game can be more significantly affected by what occurs off the reservation (Wyoming and National Forests) than what happens on it. (Tr., pp. 322-323)

Because the idea of "inherent Indian sovereignty" has given way to federal pre-emption (*McClanahan* v. *Arizona Tax Court*, 411 U.S. 164, 172 (1973)), it is also necessary to look closer at 18 U.S.C. §1165 against the backdrop of *Oliphant*. In studying the legislative history to §1165, it is apparent that Congress acted to: (1) Protect Indian lands (2) by specifically extending to Indians the right to exclude anyone from those lands; and (3) provide a criminal sanction against trespassers (4) enforced in a federal court environment in which "basic criminal rights" would attach. (*Oliphant, supra*, 435 U.S. 205-206, 211)[50] Congress adopted the same approach when it permitted Indians to enact local option liquor regulations. (Act of August 15, 1953, 67 Stat. 586, 18 U.S.C. §1161; *United States* v. *Mazurie*, 419 U.S.

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[50]"As previously noted, Congress extended the jurisdiction of federal courts, in the Trade and Intercourse Act of 1790, to offenses committed by non-Indians against Indians within Indian Country. *In doing so, Congress was careful to extend to the non-Indian offender the basic criminal rights that would attach in non-Indian related cases.* Under respondents' theory, however, Indian tribes would have been free to try the same non-Indians without these careful proceedings unless Congress affirmatively legislated to the contrary. Such an exercise of jurisdiction over non-Indian citizens of the United States would belie the tribes' forfeitures of full sovereignty in return for the protection of the United States. (*Oliphant, supra*, 435 U.S. at 211; emphasis supplied.

544 (1975)) When Congress enacted §1165 but refused to extend its scope to include fee lands within an Indian reservation, the same "basic rights" were still made available to the accused over which this Court expressed concern in *Oliphant:* Violations of §1165 would be prosecuted by the federal government in federal courts. It is incongruous to conclude that on fee lands, over which Indian sovereignty is most attenuated, if not nonexistant, that the courts would leave the Tribe free to enact and enforce the most arbitrary and discriminatory legislation conceivable.

Unlike §1165, Resolution 74-05 cannot be enforced criminally (*Oliphant, supra*), but, nevertheless, basic constitutional rights may not be available to cushion arbitrary action of the tribal council (Cf. *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 47, 56 (1978)). For those reasons also, the resolution clearly exceeds Tribal authority.

B. *Conclusion to Part III:*

In *Oliphant,* and *Wheeler,* this Court has emphatically stated that Indian tribes have been implicitly divested of their right to independently determine their external relations.[51] Once the lands within the Crow reservation went out of Crow ownership, the Tribe lost the power to regulate hunting and fishing rights which were and are appurtenant to the ownership of such lands.[52] Resolution

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[51]In their Constitution, the Crow Tribe specifically acknowledges the plenary authority of the United States. Art. VII, 4, 5, 8, CT Ex. 67, Tr., p. 27; IIJ.App., pp. 59-74.

[52]The power to regulate their "internal and social relations" cannot logically be extended to include control over the exercise of nonmember property rights on fee patented lands. See *United States* v. *Kagama, supra,* 118 U.S. 375, 379 (1886); and *United States* v. *Wheeler, supra,* 435 U.S. at 322, 326.

74-05, therefore, is invalid and unenforceable.

IV.

CROW TRIBE RESOLUTION 74-05 DEPRIVES NON-INDIANS OF FIFTH AMENDMENT GUARANTEES

On its face, Resolution 74-05 denies non-members equal protection of the law. The resolution patently extends or withholds property rights because of ethnic differences. The resolution is also patently confiscatory; it deprives non-members of the right to exercise hunting and fishing privileges on their own land. Ordinarily, such a facially discriminatory action would be suspect and subjected to the strictest scrutiny. (*University of California Regents* v. *Bakke,* 438 U.S. 265, 290 (9178); cf. *Fullilove* v. *Klutznick,* ____ U.S.____, Adv. Op., p. 20 (1980))

Although this court has stated that neither the reach of the Fourteenth or Fifth Amendments can touch tribal exercise of self-government powers (*Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49, 56 (1978)), it has also been cognizant of its duty to protect basic "personal" rights and "liberties" of all its citizens. (*Oliphant,* 435 U.S. at 210)

The fact that the "unique" status of the Indian is preserved by the Constitution, which status immunizes certain types of federally authored preferential treatment from constitutional challenges, (see, e.g., *Morton* v. *Mancari,* 417 U.S. 535 (1974); *Moe* v. *Confederated Salish & Kootenai Tribes,* 425 U.S. 463 (1976)) does not support confiscation of basic "personal" rights and "liberties" by Indian tribes themselves. This Court, in scrutinizing Indian legislation,

has emphasized that lack of participation in tribal government,[53] along with the absence of those rights Congress carefully extends to the non-Indian as would "attach in non-Indian related" cases are two of the reasons that will restrict tribal authority. (*Oliphant*, 435 U.S. at 211)

A non-Indian citizen of a sovereign state and of the United States cannot be precluded from protecting all of his property rights merely because his land lies within an Indian reservation. The lower court has held that tribal exercise of self-government powers sanctioned by the Federal Government can be so "summary and arbitrary as to shock the conscience of the federal court or goes beyond the scope of authority contemplated by the treaty." (*Settler* v. *Yakima Tribal Court*, 419 F.2d 486, 489 (9th Cir., 1969), cert. den. 398 U.S. 903 (1970)) Resolution 74-05 goes far beyond any statutory or retained treaty authority.

Resolution 74-05 also fails to pass the test of rationality applied to similar legislation authored by the states. See, e.g., *Douglas* v. *Seacoast Products, Inc.*, 431 U.S. 265, 285 (1977); *Hughes* v. *Oklahoma*, ____U.S.____, 60 L.Ed.2d 250, 262-263 (1979); *Takahashi* v. *Fish & Game Commission*, 334 U.S. 410 (1948). Although the Tribe made a token effort to rationalize the need for the resolution because of a fish and game shortage, the record actually reflects: (1) Big game is largely confined to the "mountain area" which is tribal land and thus subject to §1165 sanctions; (2) the Crow do not depend upon birds or

[53]Traditionally, a voter's disenfranchisement has been grounds to invoke "due process and equal protection." *Kramer* v. *Union Free School District*, 394 U.S. 621 (1969); *Cipriano* v. *City of Huoma*, 395 U.S. 701 (1969); *Phoenix* v. *Kolodziejski*, 399 U.S. 204 (1970); *Dunn* v. *Blumstein*, 405 U.S. 330 (1972); and cf. *Reynolds* v. *Sims*, 377 U.S. 533, 577 (1964); Pet., p. 25, n. 49, App. pp. 28-32.

fish for their dietary needs and put little pressure upon either; (3) the Tribe did not enact, nor does it enforce, any fish or game prohibitions or regulations against tribal members, who are free to exhaust the resource. (Tr., pp. 255, 346, *infra*, n. 15; CT Exs. 76, p. 4; 70-C, p. 3, Tr. 73)[54] Non-members, of course, do not participate in the tribal council which passed Resolution 74-05. (CT Ex. 67, Tr. 27, 291) After passage, Resolution 74-05 was enforced by tribal game wardens deputized as BIA agents. (tr., pp. 252-253) Compare *Santa Clara Pueblo* v. *Martinez*, 436 U.S., *supra*, at 56, n. 7; *Settler* v. *Yakima Tribal Court*, *supra*, 419 F.2d at 489; and *Colliflower* v. *Garland*, 342 F. 2d 369 (9th Cir., 1965).

The claim that there is a fish and game shortage is "specious" when the Tribe makes no attempt to restrict the quantity of fish and game captured by its own members. (*Douglas*, *supra*, at 285) The game and fish on the Crow Indian Reservation, just as the Menhaden studied in *Douglas*, do not respect reservation boundaries or Indian lands. (*Id.*, at 285; cf. *Hughes* v. *Oklahoma*, *supra*, 60 L.Ed.2d at 263)

If we study those factors which confirmed the constitutionality of Montana's resident —non-resident license classification in *Baldwin* v. *Montana Fish & Game Comm'n*, 436 U.S. 371, 389-390 (1978), it becomes evident that Montana's contribution to the

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[54]Mere recital of benign purposes is not an automatic shield against constitutional inquiry. *Califano* v. *Webster*, 430 U.S. 313 (1977); cf. *Bakke*, *supra*.

fish and game resource far outweighs that of the Tribe.[55]

All of the parties to this litigation have insisted that the privilege to hunt and fish constitutes a property right.[56] (Pet., p. 24, n. 47) Montana has so declared in *Herrin* v. *Sutherland*, 74 Mont. 587, 601, 241 P. 328 (1925). Yet, the Tribe has confiscated the non-Indian's property right, which is automatically attached to the fee, through a facially discriminatory resolution. The fact that the authors of that resolution are Indian cannot serve to sanctify an otherwise unconstitutional act.

Finally, the lower court's imaginative effort to soften the effect of the Tribe's patently discriminatory resolution by creating yet another sub-classification between resident and non-resident landowners only serves to illustrate the fundamental unfairness and invalidity of the entire resolution. A landowner's rights to use and enjoy his property do not hinge on residency. The fact that the lower court could not perceive a "legislative or executive solution * * * within the reasonable foreseeable future" (604 F.2d at 1172; Pet. App., p. 23) did not create judicial license to legislate its own. Once the lower court decided that a landowner did indeed possess hunting

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[55]For example, the State helps maintain the game population through state taxes; the State and non-Indians work to improve the habitat and plant fish and game; the State enforces its game regulations against non-Indians at state expense; the State enforces air and water quality laws against non-Indians. There is no evidence that the non-Indian is more of an enforcement problem than the Indian nor that he is any more likely to disregard basic conservation ethics.

[56]Compare *Menominee Tribe* v. *United States*, 391 U.S. 404, 413 (1968). The rights to "acquire, enjoy, own and dispose of property" are protected from discriminatory state action by the Fourteenth Amendment. *Shelly* v. *Kreamer*, 334 U.S. 1, 10 (1948); *Lynch* v. *HFC*, 405 U.S. 538, 544 (1972).

and fishing privileges on fee lands, then the court was compelled to confer that right evenly. The genesis of hunting and fishing rights and all values in the land is the same in all cases: Federal legislation implemented by federal patents containing uniform language. The rights which flow from this federal action must be uniformly distributed — not on the basis of residence but, rather, on the basis of land ownership — the only rational common denominator. The lower court's error should be corrected.

V.

RESOLUTION 74-05 VIOLATES THE INDIAN CIVIL RIGHTS ACT[57]

Neither the United States nor the Tribe has responded to the State's argument that Resolution 74-04 violates the Indian Civil Rights Act (hereafter ICRA). (Pet., pp. 27-28; cf. briefs in opposition) As this Court focused upon in *Oliphant, supra,* Congress modified the ICRA to include within its scope "any person." That change merely demonstrated "Congress' desire to extend the act's guarantees to non-Indians *if and when they come under a tribe's criminal or civil juirisdictions, by either treaty provision or Act of Congress.*" *Oliphant, supra,* 435 U.S. at 195, n. 6; emphasis supplied; see also, *Dry Creek Lodge, Inc.* v. *United States,* 515 F.2d 926, 934 (10th Cir., 1975); *Schanz* v. *White Lightning,* 502 F.2d 67, 70, n. 5 (ith Cir., 1974); *Hickey* v. *Crow Creek Housing Auth.,* 379 F.Supp. 1002 (D.S.D., 1974); and *Dodge* v. *Nakai,* 298 F.Supp. 17(D.Ariz.,

[57]See Pet., p. 5; hereafter the "ICRA."

1968). Although the State takes the position that there is no treaty provision or congressional act supporting Resolution 74-05, yet if this Court should find such support, then it is patent the resolution violates the fundamental precepts of 25 U.S.C. §1302 (8). See Section IV, supra; App., pp. 32-35.

VI.

THIS CASE, AT TRIAL LEVEL, INVOLVED FACTUAL ISSUES; THEREFORE, THE LOWER COURT WAS NOT WARRANTED IN SETTING ASIDE THE DISTRICT COURT'S FINDINGS ON THOSE ISSUES UNLESS THEY WERE "CLEARLY" ERRONEOUS."

The lower court, in reversing the trial court, relied in large part on its previous holding in *United States* v. *Finch*, 548 F.2d 822 (9th Cir., 1976) vacated 433 U.S. 676 (1977). For example, with regard to the issue of ownership of the bed and banks of the Big Horn River, the lower court in effect adopted *Finch, en toto,* without expressing any additional rationale. Petitioner was not a party to *Finch* except as *Amicus curiae.* As such, it had no opportunity to introduce evidence or to examine or cross-examine witnesses. The State's property and regulatory rights were not the primary issues in *Finch.* However, in the trial of the instant case, the State, for the first time, had the opportunity to participate as a full party in defense of its rights. Both the transcript and the district court's references thereto bear witness to the circumstance that the State availed itself of this opportunity only to have the lower court in effect ignore and thereby, *sub silentio,* set aside

this evidence when the trial court expressly relied upon an extensive record (Compare *Wilson* v. *Omaha, supra*, 61 L.Ed. at 173) in refusing to follow the lower court's *Finch* ruling (457 F.Supp. at 600-601, n. 1; J.App. 29-30), thus inhibiting the lower court from setting aside the trial court's judgment which was expressly predicated upon factual findings. Rule 52(a), Federal Rules of Civil Procedure; Pet. 5-6; *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 341-342 (1949); *United States* v. *National Ass'n. of Real Estate Boards*, 339 U.S. 485, 495-496 (1950); *United States* v. *Oregon State Medical Society*, 343 U.S. 326, 332 (1952)

The fact that Indian treaties and statues are the focal point of attention does not make in-applicable Rule 52(a). In *Martin* v. *Waddell, supra*, 41 U.S. at 414-415, 418; *Holt, supra*, 270 U.S. at 58; *Choctaw Nation* v. *Oklahoma, supra*, 397 U.S. at 634; *Puyallup III, supra*, 433 U.S. 174; and *Skokomish Indian Tribe* v. *France*, 320 F.2d 205, 212 (9th Cir., 1963), the courts examined and relied upon facts relating to execution of treaties and land grants and subsequent interpretations placed upon them. In *Oliphant, supra*, 435 U.S. at 206; *Rosebud Sioux Tribe* v. *Kniep*, 430 U.S. 584, 604-605; and *Puyallup, III, supra*, 433 U.S. at 175, this Court made extensive use of trial evidence bearing on jurisdictional issues to assist it in making its decisions. Since the trial court's decision was expressly predicated on the extensive record in this case, Rule 52(a) prohibited the lower court from reversing his judgment.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully request this Court to reinstate the district court's judgment (IJ. App. 103-104.)

RESPECTFULLY SUBMITTED this _____ day of July, 1980.

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